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Supreme Court of the United States

OCTOBER TERM

No. 490

BERT ERDMAN,

Libellant-Petitioner,

vs.

UNITED STATES OF AMERICA, AMERICAN LINE STEAMSHIP CORPORATION and ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

WARNER PYNE,
LEO J. BONDY,
J. NORMAN LEWIS,
Proctors for Libellant-Petitioner.

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INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI 1

Statement of the Matter Involved 1

Jurisdiction 2

The Facts 2

The Decision of the District Court 4

The Decision of the Circuit Court of Appeals .. 5

The Question Presented 7

Reasons for Allowance of the Writ 7

BRIEF IN SUPPORT OF PETITION 9

POINT I.—The fact that a passenger has placed himself in a position of danger, even by reason of his own act of negligence, does not discharge an ocean carrier from its continuous duty of taking whatever steps it can to prevent the passenger from receiving injury because of his position of danger 9

CONCLUSION 20

CASES CITED

Admiral Peoples, 9 C. C. A., 1935 Am. Maritime Cases 765 10

Arabic, The, 2 C. C. A., 50 Fed. (2nd) 96 ..... 7, 10, 13, 16

Augusta Railway & Electric Co. v. Smith, 121 Georgia 29 13

Birmingham Railway Light & Power Co. v. Bynum, 139 Ala. 389 ..... 13, 14

Boston & Yarmouth S. S. Co. v. Frances, 1 C. C. A., 249 Fed. 450 ..... 10, 16

PAGE

Carrico v. West Virginia Cent. & P. Ry. Co., 39 W. Va. 86, 99-101 14
Chunn v. City and Suburban Railway of Washington, 207 U. S. 302 ..... 7, 10
City of Panama, 101 U. S. 453, 462 10

Gage v. St. Louis Transit Co., 211 Mo. 139 13
Garden City, The, 26 Fed. 766 10

Holmes v. Southern Pacific R. Co., 97 Cal. 161, 169 .. 19

Korea Maru, The, 9 C. C. A., 254 Fed. 397 16

Manhasset, The, 19 Fed. 430, 433 10

Pennsylvania Company v. Roy, 102 U. S. 451 9
Philadelphia & Reading RR. Co. v. Derby, 55 U. S. 486 10

Robins v. Pennsylvania Co., 245 Fed. 435, 441 (C. C. A. 6) 19

So. Covington, etc., Ry. v. McCleave, 18 Kentucky Law Rep. 1037 14
Steam Dredge No. 1, The, 134 Fed. 161 ..... 7, 12
St. Louis, I. M. & S. Railway Co. v. Loyd, 109 Ark. 579, 583 13

Weisshaar v. Kimball Steamship Co., 128 Fed. 397 .. 7, 11
Willmott v. The Corrigan Consol. St. Ry. Co., 106 Mo. 535, 542, 543 13

STATUTE CITED

Judicial Code, 28 U. S. Code, Sec. 347(a) 2

MISCELLANEOUS CITATIONS

Hutchinson on Carriers, 3rd Edition, Vol. 3, Sec. 1173, page 1368 10
11 Corpus Juris 283 19

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Bert Erdman for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows:

Statement of the Matter Involved.

This application involves a decision of the Second U. S. Circuit Court of Appeals in an order of June 27, 1944 for the issuance of a mandate for reversal of a final decree in admiralty of the District Court, Southern District of New York. The suit was brought to recover for personal injuries sustained by the libellant-petitioner while a passenger on the respondents' steamship *California*. The United States was made party respondent to permit

proceedings on principles in rem, as title to the vessel was transferred to the government after the accident. The District Court (CONGER, *J.*) found that both the libellant and the respondent operators of the steamship had been negligent, and under admiralty practice permitting division of damages awarded libellant half damages in the sum of $20,757.53. The Circuit Court of Appeals (Presiding Judge LEARNED HAND dissenting) reversed the District Court and ordered the libel dismissed.

Jurisdiction.

The jurisdiction of this court in invoked under Sec. 240 as amended, of the Judicial Code (28 U. S. Code, Sec. 347[a]).

The Facts.

On January 10, 1938 libellant was a passenger on the steamer *California* on a trip from New York to San Francisco. On the afternoon of that day for about half an hour he had been on deck in bathing trunks (fol. 426) in the vicinity of an outdoor swimming pool which he then decided to enter (Finding 14, p. 869).

The pool had been built into a cargo hatch opening (Finding 6, p. 867). There was a platform around the sides and at both ends of the pool, the platform being higher than the deck, and at the rear end of this platform on each side there was a narrow stairway of two steps from the deck to the platform. Along the lateral sides and outer edge of this platform were wooden stanchions through which holes had been drilled at the top, and a three inch cotton rope was stretched through the holes from the forward end of the pool to the last or aftermost stanchion, which was at the forward side of the top of the two steps. This cotton rope was in place at all times.

Another and shorter rope was provided, a removable one, "which could be taken down and put up as desired" and which when up ran from the last stanchion across the top of the steps to the bulkhead at the after, or rear end of the platform (Findings 9, 10, 11, p. 868). This short rope, about five feet in length, was taken down when the pool was in use, but was intended to be up when the pool was not in use (Finding 10, p. 868). No other means of barring access to the pool was employed or claimed to have been employed by respondents. No signs or notices of any kind were posted at or near the pool to warn passengers that the pool was not to be used, and there were no regulations posted informing passengers when or under what weather conditions the pool might be used (Findings 36, 37, p. 872). There were no markings of any kind on the sides or ends of the pool, or anything else to indicate the depth of the water in the pool at any time (Finding 17, p. 870).

Libellant after deciding to enter the pool walked along the deck to the steps leading to the platform on the starboard side of the pool, there handed his bath robe and slippers to a ship's steward named Jensen, who was stationed at the pool (fols. 442, 179, 180, 807); and then walked across the platform to a ladder which led from the after, starboard side of the platform down into the pool. "In entering the pool the libellant did not hurry or jump in without looking" (Finding 23, p. 870). "After proceeding down the ladder, libellant reached his foot into the water, and then called back to a friend that the water was fine or was not cold" (Finding 24, p. 870). All of these movements were conceded by Jensen to have been in his immediate presence and observation (fols. 1539-40, 1548-50); and Jensen the court found was only "about 8 or 10 feet away from libellant" when he entered the pool (Finding 44, p. 873).

The sea had been rough during the morning of the day the libellant entered the pool, and was rough at the

time he entered it. During the morning there was a "strong breeze and rough sea" (Finding 20, p. 870). "There had been a storm previously which had subsided but which left the sea rather rough with a strong wind blowing" (Finding 19, p. 870). For the four afternoon hours immediately preceding the time, about 4 p. m., of the libellant's injury, there was a "strong easterly wind" and a "rough easterly sea" and the vessel was "rolling and pitching moderately" (Findings 20, 55, pp. 870, 874).

At the time the libellant entered the pool, it was, as he knew, being filled, and it "was about half full and had between 3½ and 5 feet of water in it" (Findings 15, 16, p. 869).

After calling back to his friend about the condition of the water, libellant then faced the water in the pool, with his hands in back of him, and entered the water by what may be termed a 'flat' or 'shallow' dive" (Finding 27, p. 871). He had taken only a few strokes when he was thrown against the side of the pool (Finding 33, p. 872) so heavily that his neck was broken and he sustained painful, permanent injuries (Findings 61, 62, pp. 875, 876).

The Decision of the District Court.

The District Judge found that the respondents were negligent because: (1) None of the officers or crew of the steamship gave any warning to libellant. (2) There was no sign or warning to passengers not to use the pool, but on the contrary there was continuous invitation to passengers to use it. (3) There was no system of looking after the safety of passengers in regard to the pool, no regulations posted informing passengers when or under what weather conditions the pool might be used. (4) No effort made either by the pool steward Jensen; or by the master-at-arms, whose particular duty it was to see to the safety of passengers; or by the master or any other officer

of the ship to warn libellant against going into the pool, or warn him in any way as to any danger which might be encountered in going into the pool (Findings 35 to 53, pp. 872-4).

With respect to the question as to whether "the short length of rope which was intended to be across the steps leading up to the pool * * * was up or down," the court found the testimony "so conflicting that I cannot and do not find whether the rope was up or down," (Finding 26a, p. 871). Nevertheless the court further found that it was "unimportant" whether this rope was up or down because it did not constitute a warning or notice that "the pool was not to be used, or that there was any danger in using the pool, and the rope did not and would not bar access to the pool" (Conclusion 6, p. 877).

Libellant was held guilty of contributory negligence (Conclusion 9, p. 878) because, although he was a "landsman and not a sailor" and accordingly "was unaware of the inherent dangers of going into this pool," as "the danger" was "not too apparent to him," nevertheless since the water in the pool was in an agitated condition and the pool was being filled "he must have known that it was somewhat dangerous" even though "he may not have known the degree of danger" (Finding 54, p. 874).

The Decision of the Circuit Court of Appeals.

Because libellant admitted that if the short piece of rope (which respondents' witnesses testified was present across the top of the steps but which petitioner's witnesses testified was not present) was in position across the steps he would not have passed it to go into the pool, the majority of the judges of the Circuit Court of Appeals held that the failure of the libellant to prove that the rope was not in position was a failure of libellant to prove *any*

negligence (p. 906) and deprived libellant of any right of recovery, because, if the rope was in position, it constituted notice to the libellant that the pool was not open for use and that libellant was forbidden by the presence of the rope to use the pool; that "Such information, however conveyed to him, fulfilled the respondents' duty to this libellant"; that "the respondents having withdrawn any general invitation to passengers to use the pool and having brought home to the libellant that fact by means of the rope were under no duty to warn him of the dangers he would probably encounter in using it" (p. 906). The respondents were under no duty "to advise him of specific risks he would incur by going into the pool" and "under no duty to warn him of the danger he would probably encounter in using it" (p. 906).

Presiding Judge Learned Hand did not agree with his associates in their conclusions that no further duties were owed to the libellant by respondents after he had passed the rope, which they assumed was in position. In a dissenting opinion, he stated that even though the rope was in position and libellant passed it, nevertheless this disregard of the notification given to the libellant by "implication" (p. 907) not to go into the pool, did not forfeit all rights which libellant had as a passenger to have his safety protected by respondents nor did libellant by passing the rope and proceeding to the pool incur every type of risk which might follow from his use of the pool. He said:

> "A man may take some chances without taking other chances such as those of which he has no warning. All that Erdman should be charged with was the general dangers which might be present when he went where passengers should not go; and not with foreseeing that when the ship pitched, the swash of the water would have such force as it did. His disregard of his safety was not to be measured as exposing him to that specific danger" (p. 908).

The Presiding Judge stated further that when Jensen, the ship's steward stationed at the pool, failed to warn libellant not to go into the pool "it was a failure in that extreme care which the law exacts of a carrier of passengers. The ship having stationed a steward at the place, was charged with instructing him to tell passengers not to enter" (p. 908).

The Question Presented.

Does a steamship passenger by negligently placing himself in a position of danger thereby discharge the carrier from any duty of exercising any care with respect to the passenger's safety thereafter, even though the carrier's employees see the passenger in such position of danger, realize the nature of the danger and have sufficient opportunity to warn him fully of the nature and extent of the danger?

Reasons for Allowance of the Writ.

The majority of the Circuit Court of Appeals has decided an important question of law not only in conflict with the decisions of this court but also in conflict with decisions of the Circuit Courts of Appeals for the First and Ninth Circuits, and its own prior decision, namely: *Chunn* v. *City and Suburban Railway of Washington*, 207 U. S. 302, and similar decisions of this court; the decision of the Circuit Court of Appeals for the First Circuit in *The Steam Dredge No. 1*, 134 Fed. 161; the decision of the Circuit Court of Appeals for the Ninth Circuit in *Weisshaar* v. *Kimball Steamship Co.*, 128 Fed. 397; and the decision in *The Arabic*, 2 C. C. A., 50 Fed. (2nd) 96.

The necessary result and effect of the decision of majority of the Circuit Court of Appeals is a holding that

when a passenger on an ocean steamer has by his own act of negligence placed himself in a position of danger, the carrier is under no duty thereafter to take any steps whatever to look out for the safety of the passenger, even though the dangerous nature of his position is known to and observed by the carrier's employees and sufficient opportunity is afforded to them to take action and notify the passenger of the full nature and extent of the danger, of which full nature and extent the passenger himself is unaware.

WHEREFORE libellant-petitioner prays that this Honorable Court shall issue a Writ of Certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify the record herein, so that this Honorable Court may review this cause and act therein as of right and according to law ought to be done, and that your libellant-petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just.

New York, September 21, 1944.

BERT ERDMAN,
Petitioner,

By WARNER PYNE,
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